Supreme Court, U.S.
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No. 08-166

In the Supreme Court of the United States

PATRICIA STEPHENS,
Petitioner,

v.

ALBEMARLE COUNTY, VIRGINIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether a member of the public has standing to challenge, under the First Amendment, the terms of a settlement agreement to which she is not a party, even though she has never communicated, or sought to communicate, with the individuals whose speech is restricted by the terms of the settlement agreement?

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STATEMENT OF THE CASE

I. The Underlying Facts

In the mid-1990s, a number of individuals living near a landfill operated by the Rivanna Solid Waste Authority ("RSWA") became concerned about water and air pollution from the landfill. The concerned neighbors organized into a group called the Ivy Steering Committee (the "Committee"), began meeting on a regular basis, communicated with regulatory agencies, established and maintained a website, and erected a billboard relating to issues of water pollution.

Ultimately, many of the concerned neighbors filed a lawsuit, *Weber v. RSWA et al.*, against the RSWA, the City of Charlottesville, and the County of Albemarle (the "Weber lawsuit"). The Weber lawsuit alleged that the landfill was contaminating the surrounding air and water in violation of federal and state environmental statutes and state nuisance law. All but four of the plaintiffs in the Weber lawsuit settled their claims by entering into two separate settlement agreements in 2000 (the "Settlement Agreements").

Ms. Stephens (and her husband, prior to his death) lived near the landfill. Ms. Stephens's husband, Wayne, worked as the landfill's manager until 2003. Neither Ms. Stephens, nor her husband, (the "Stephenses") were members of the Ivy Steering Committee and never attended their meetings. The Stephenses never visited the Committee's website, nor saw the billboard they erected. The Stephenses never

heard or read any information from either the Committee or the plaintiffs in the Weber lawsuit that entered into the Settlement Agreements. The Stephenses never received, or sought to receive, any information regarding any aspect of the landfill from any plaintiff in the Weber lawsuit who entered into the Settlement Agreements (either before or after the plaintiffs entered into the Settlement Agreements).

On April 10, 2003, Wayne Stephens was using a cutting torch to cut old storage tanks; the torch sparked an explosion, killing him.

II. The Fourth Circuit's Opinion

The Fourth Circuit did not, as the Petitioner states, hold that Stephens lacked standing because she "had not shown that she or her husband had, prior to the silencing agreements, specifically sought safety information from her silenced neighbors." *Petition* at 4. Rather, the Fourth Circuit based its holding on the fact that "there exists no direct connection between Booth and/or Burke and Stephens, such that, absent the settlement agreements, Stephens would expect to receive the information that Booth and Burke possessed." (Appendix; 16a-17a).

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING FOLLOWS EXISTING CASE LAW AND IS CORRECT

The Petitioner accuses the Fourth Circuit of "departing from precedent in this Court, standing at

odds with decisions from other circuits and acting *sua sponte* . . ." adding on a novel and overly restrictive standing requirement to First Amendment right to receive cases. *Petition* at 4. However, leaving aside the turgid rhetoric, a careful analysis of the facts of the case and the Circuit Court's reasoning and holding demonstrates that the Fourth Circuit merely recognized its constitutional obligation to determine whether Stephens had standing, and followed established First Amendment case law in determining that she did not.

Petitioner cites *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) in an effort to show that the Fourth Circuit's decision departs from precedent in this Court. In *Virginia Pharmacy,* Petitioner argues, the Court did not impose a requirement that "some specific pharmacist had ever in fact spoken to some specific plaintiff in the past about the prices . . .." *Petition* at 5. While this statement by the Petitioner, as far as it goes, is correct, she ignores the facts of the case that are not helpful to her position.

In *Virginia Pharmacy* the plaintiff consumers included an individual who required daily prescription medication, and two nonprofit organizations with members who were prescription drug users. The parties stipulated that, in the absence of the challenged statute, some pharmacies would advertise prescription drug prices[1]. Accordingly, there was a

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[1] Interestingly, Petitioner states that in *Virginia Pharmacy* "there was some degree of presumption" as to the willing speaker

clear and direct connection, free of conjecture, between the pharmacists, who wished to advertise drug prices, and the prescriptio . drug users, who required and purchased prescription drugs and therefore necessarily were the targets of the restricted advertising. The facts established that the consumers were, in fact, potential recipients of the restrained speech.

Petitioner goes on to cite a number of circuit court opinions for the proposition that the question of standing turns purely on the existence of willing speakers. However, a careful analysis of these cases demonstrates that in all of the right to receive cases, standing was established through facts demonstrating both the existence of willing speaker, and that the plaintiff had a direct connection with the willing speaker such that their status as a potential recipient of the restrained speech was free from conjecture and speculation.

Petitioner cites *In Re Application of Dow Jones & Co., Inc.*, 842 F.2d 603 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988), grossly oversimplifying the factual basis for the court's holding by stating that the Court found "that news organizations had standing because there were willing speakers." *Petition* at 6. In so doing, Petitioner ignores both the facts in the record, and the Court's statement that it had to consider whether the "news agencies [were] actually potential receivers of otherwise restrained speech . . .." *Dow Jones* at 607. As set forth in the opinion, the record reflected that

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requirement. There was no presumption, there was an explicit stipulation. *Virginia Pharmacy* at fn 14.

the news organizations had been receiving information from the trial participants (either directly or indirectly) before the restraining order went into effect. Newspaper articles, containing details of the investigation and grand jury proceedings, had appeared in all of the subject area's major newspapers for months. Thus, relying on the history of actual communications between the plaintiffs and the restrained speakers, the Court found that the "record clearly support[ed] the district court's conclusion that the news agencies [were] in fact potential recipients of speech . . .." *Id.* at 607.

In sharp contrast to the factual background in *Dow Jones,* the record in the case at bar demonstrates that Stephens and her husband never communicated in any manner with the restrained speakers, prior to the speakers voluntarily entering into the Settlement Agreements.

Petitioner goes on to cite *FOCUS v. Allegheny County Court of Common Pleas,* 75 F.3d 834 (3d Cir. 1996), arguing that the Third Circuit determined that the plaintiffs, as potential recipients of speech, had standing to challenge a gag order by "looking solely to whether otherwise willing speakers existed." *Petition* at 6. However, as with her analysis of *Dow Jones,* the Petitioner conveniently ignores numerous facts in the record that demonstrate that the plaintiffs had been receiving speech, from the willing speakers, prior to entry of the gag order.

The challenged gag order arose out of a highly publicized child custody case, *In re Byron Griffin* (the "Baby Byron" case), filed in the Family Division of the

Allegheny County Court of Common Pleas (the "Court of Common Pleas"). As set forth in the opinion, FOCUS was an association with the goal to make the Allegheny County Children and Youth Services more accountable, accessible and understandable. In pursuit of that goal, FOCUS had been interested in, and keeping informed about, the Baby Byron case prior to entry of the gag order. Therefore, when the Court of Common Pleas entered the gag order, FOCUS attempted to intervene for the limited purpose of challenging the gag order under the First Amendment, arguing that gag orders hindered their efforts to keep informed about the Baby Byron case.

These facts demonstrate that FOCUS had, prior to the entry of the gag order, been receiving speech from the restrained (but still willing) speakers. These same facts also distinguish *FOCUS* from the case at bar. The Stephenses were never interested in the Weber lawsuit, much less did they ever try to keep informed about it. The Stephenses never had any communications whatsoever with the plaintiffs in the Weber lawsuit[2]. Rather than trying to intervene in the Weber lawsuit, Stephens did not challenge the provisions of the Settlement Agreements until four

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[2] In fact, the Stephenses did not communicate with any members of the Committee, some of whom were not parties to the Settlement Agreements and therefore remain able to speak out concerning any aspect of the landfill. Indeed, the only individual known to have been on notice of the practice which led to Mr. Stephens's death, was not a party to the Settlement Agreements, could have spoken out publicly about the practice, but chose not to.

years after the parties to the Weber lawsuit entered into them.

Petitioner's analysis of *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497 (D.C. Cir. 1995) is similarly flawed as a result of her myopic view of the facts in the case. As with the prior cases upon which Petitioner relies, she focuses on facts relating to the existence of willing speakers, ignores facts establishing that the plaintiff was indeed a potential recipient of the speech, and as a result fails to properly understand the import of the case.

In *Taylor,* four individual plaintiffs and one public interest group filed suit against Resolution Trust Corporation (the "RTC"). The four individual plaintiffs were former employees of the RTC. A public interest group, the Government Accountability Project ("GAP"), was an organization that represented individual whistleblowers and used the information they obtained to mount public education campaigns about government waste, fraud and misconduct. The suit alleged that the RTC was violating a federal statute which prohibited the RTC from discriminating against employees who disclosed internal wrongdoing. Additionally, GAP alleged that the RTC violated its First Amendment rights to receive information from willing speakers. Specifically, GAP alleged that the RTC's actions had prevented it from receiving information from willing speakers (including the individual plaintiffs) within the RTC.

GAP pled a number of facts that were critical in establishing that it had standing, as potential recipients of restricted speech, to pursue its First

Amendment claim. One of GAP's projects was to challenge mismanagement within the RTC; as part of this project, GAP had previously helped RTC employees testify before congressional committees. Additionally, GAP specifically alleged "specific ways, direct and indirect, by which the RTC [had] intercepted and interfered with the organization's communications" with willing speakers within the RTC. Thus, there were allegations[3] that the RTC's actions had restrained ongoing and actual communications between GAP and willing speakers. There are no such allegations, much less evidence, in the case at bar.

As a careful analysis of these cases demonstrates, the Fourth Circuit's holding is far from "unprecedented" as alleged by the Petitioner. Rather, it is consistent with existing First Amendment case law. In the cases discussed above the existing relationship between the willing speaker and the potential recipient was sufficiently clear, direct and free of conjecture so as to impart standing on the potential recipient.

Indeed, a review of this Court's relevant opinions demonstrates the same point. For example, in *Procunier v. Martinez*, 416 U.S. 396 (1974) prison inmates challenged the constitutionality of the prisons' censorship of their mail. The link between the sender of the mail and the inmates (to whom the mail was

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[3] *Taylor* was an interlocutory appeal from a denial of preliminary injunctive relief, and thus the court, without the benefit of discovery or summary judgment motions, relied on the parties' allegations for purposes of determining standing.

addressed and delivered) was direct, free from speculation, and therefore sufficient to confer standing on the inmates as potential recipients of the affected speech.

Similarly, *Lamont v. Postmaster General*, 381 U.S. 301, 304-305 (1965) involved an individual's right to receive, free from government interference, certain publications (deemed communist propaganda) through the postal service. Because the two individual appellants had attempted to receive the publications through the mail, but had them detained by the postal service, there was no question that they were potential recipients of the publications.

Finally, *Kleindienst v. Mandel*, 408 U.S. 753 (1972) involved the denial of a visa to Mandel, a Belgian journalist invited to participate in academic conferences in the United States. *Id.* at 759. Mandel and several university professors, who had either invited Mandel to speak or expected to participate in the conferences with him, challenged the denial of the visa on First Amendment grounds. *Id.* at 759-760. The professors' status as potential recipients of Mandel's speech was beyond question; they had either directly invited him to speak at their universities, or had a genuine expectation of participating in academic discussions with him pursuant to the invitation.

As these cases demonstrate, to establish standing, courts have uniformly required a showing that that "potential recipients" of restrained speech have, in fact, the potential of receiving speech from willing speakers absent the challenged restrictions. Plaintiffs have met this burden, and established standing, in a

wide variety of factual circumstances. Nonetheless, in all such circumstances, there has been a direct relationship or connection, between the willing speaker and the potential recipient, which established that the plaintiff would have been a recipient of the speech but for the governmental restriction.

Thus, the Fourth Circuit has not departed from existing case law, or fashioned a new standing requirement, as argued by the Petitioner. Rather, the Court followed existing case law in analyzing the standing issue, determined that Stephens' assertion that she and her husband were potential recipients of speech affected by the Agreements was based purely on speculation and conjecture, and correctly held that Stephens lacked standing to pursue her claims.

CONCLUSION

There is no compelling reason for granting a writ of certiorari in this matter; the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

COUNTY OF ALBEMARLE, CITY OF CHARLOTTESVILLE, and RIVANNA SOLID WASTE AUTHORITY, By Counsel

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